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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

No. 32

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UNITED STATES OF AMERICA, *ex rel.* LEE KUM HOY, LEE KUM CHERK, and LEE MOON WAH,

*Petitioners*,

—v.—

JOHN L. MURFF, District Director of the Immigration and Naturalization Service,

*Respondent.*

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## PETITIONERS' MOTION TO STRIKE IMMATERIAL AND SCANDALOUS MATTER

Petitioners, by their attorneys, respectfully move this Court to strike from the record, pursuant to Rule 40(5) and its inherent powers, the Foreign Service Despatch of December 9, 1955 and the attached undated and unsigned and anonymous "Report on the Problem of Fraud at Hong Kong" sent from the American Consul General at Hong Kong referred to in the prior despatch of December 1, 1955. This Report was filed by the Respondent with this Court without leave of Court or motion to enlarge the record. Petitioners also move the Court to strike from the Respondent's Brief the numerous references to the said Report (Br. pp. 19-20, 25, 27, 30, 32) and for the following reasons:

1. This undated Report and any investigative material on which it was based were never submitted in evidence in any of the extensive administrative hearings in the Immigration and Naturalization Service or in any of the proceedings in the courts below, and is, therefore, not a part of the record before this Court.

2. The submission at this time of this Report containing highly controversial allegations of fraud among Chinese persons, is prejudicial, improper and unfair and deprives Petitioners of the opportunity to cross-examine the unknown author of such Report and to attack the conclusions therein.

3. The Report contains impertinent, inflammatory and unproved charges against the entire Chinese race, which were not made under oath and are not entitled to the consideration of this Court and are irrelevant, immaterial and scandalous.

WHEREFORE, Petitioners respectfully pray that an order be granted striking the said Report from the Record and striking all references to said Report from Respondent's Brief.

Dated: November 15, 1957

EDWARD J. ENNIS
*Counsel for Petitioner Lee Moon Wah*

BENJAMIN GIM
*Counsel for Petitioners Lee Kum Hoy and Lee Kum Cherk*

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## PETITIONERS' REPLY BRIEF

Petitioners reply briefly to respondent's arguments that (I) in fact blood testing was not restricted discriminatorily to Chinese; (II) blood testing only Chinese was justified and not in law discriminatory; and (III) the blood test evidence was admissible even though obtained pursuant to an unlawful discriminatory practice.

### I.

**In fact racial discrimination against Chinese was practiced.**

The greater part of respondent's argument (Br. 18-33) is devoted to the factual argument that blood testing citizenship claimants was "first adopted" (Br. 19) with respect to Chinese because of the prevalence of fraudulent claims among them and then "was utilized generally" (Br. 33)

after it was found helpful in Chinese cases. This argument, however, fails wholly to meet the undisputed facts that when petitioners were blood tested twice in July and August, 1952, and for a two and a half year period thereafter until the last administrative hearing on December 10, 1954, the indisputable evidence, accepted by the court below, was that 500 Chinese had been blood tested and there was no evidence of blood testing any non-Chinese (R. 420a). Even if the affidavits submitted in support of the motion for reargument in the District Court after the final decision in the case could be considered[1] they merely show blood testing of non-Chinese beginning on January 10, 1955 (Ex. A, R. 96a-98a). This belated blood testing of some non-Chinese cannot retroactively absolve from judicial condemnation of discrimination the practice of blood testing all Chinese, including petitioners, and no one but Chinese for over two and a half years.

The respondent concludes his argument on this point (Br. 32-33) with the statements, which petitioners challenge, that when petitioners were blood tested in July and August, 1952, there were no Service instructions relating

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[1] These affidavits in support of the denied motion for reargument, containing statements that non-Chinese had been blood tested, are not evidence properly in the record and should not be considered by the Court. *Grame* v. *Mutual Assurance Society of Virginia*, 154 U. S. 676; *Susquehanna Boom Co.* v. *W. Branch Boom Co.*, 110 U. S. 57, 59. For all that appears from one of the affidavits which states (R. 101a) that some non-Chinese were blood tested in determining citizenship and paternity and that a number of citizens of the Chinese race received passports without blood testing, it may be that the citizens of the Chinese race granted passports were all persons living in the United States who had had passports before and were merely going abroad for visits and that all of the derivative United States citizens of the Chinese race seeking passports abroad to come to the United States for the first time were blood tested (R. 105a). These general statements were not subjected to that cross-examination which elicited important admissions from the Government's witness at the administrative hearing.

to blood testing; that instructions thereafter issued referring specifically to Chinese did not limit blood testing to Chinese; and that during 1952 to 1954 at least four non-Chinese were blood tested. The first statement that there were no Service instructions on blood testing in July and August, 1952, is based on the self-serving statement of the Service's witness that it was not until late 1952 or early 1953 "that any instructions at all were made by the Service with respect to blood tests" (R. 326a). This witness, however, on cross-examination qualified this quoted statement and indicated that there may have been original but not "final authorization" for blood testing prior to the end of 1953 (R. 312a). He testified that "There may have been some instructions concerning the use of blood tests in other types of procedures but none in Exclusion proceedings" (R. 313a). Moreover, the Service refused to produce the Operations Instructions in effect in July and August, 1952 (R. 316a). On this record the respondent's claim that there were no instructions on blood testing Chinese at the time petitioners were in fact blood tested cannot be accepted.

The respondent's second statement that later instructions referring specifically to Chinese did not limit blood tests to Chinese similarly cannot be accepted. The Service refused to allow petitioners' counsel to examine these instructions and even refused to summarize them or reveal any of their specific language (R. 321a-324a). Although possibly these instructions did not specifically prohibit blood testing of white persons it is reasonably clear that by specifically directing blood testing of Chinese and no others they established a racially discriminatory system of blood testing Chinese and not white persons. This view is supported by the Service's admission that these instructions were changed in 1954 to eliminate reference to the Chinese racial or nationality group (R. 327a, Br. 9-10).

The last statement (Br. 33) that at least four non-Chinese persons were blood tested in the period 1952-1954 is subject to the qualifications that on cross-examination the witness conceded that two of the cases involved British subjects from the British West Indies who quite possibly were Negroes (R. 357a); that a request to examine the files to determine the facts was refused (R. 351a); and that the subsequent affidavit of August 22, 1955, listing blood tests of white persons, apparently does not include these cases but begins with blood tests on and after January 10, 1955 (R. 96a).

It is submitted that the respondent has failed wholly to support his argument that "there was never any administrative policy to limit blood testing to Chinese applicants" (Br. 18) because the record establishes that in fact for a period of over two and a half years there was such a policy and practice of blood testing all Chinese and no white persons.

## II.

**There is no factual or legal justification for the racially discriminatory practice.**

The respondent argues (Br. 34-41) that blood testing only Chinese was not grossly and racially discriminatory because Chinese citizenship cases presented an evil not equally present in other cases. The petitioners adhere to but do not repeat their argument (Br. 16-18), not answered in respondent's brief, that this defense of alleged factual justification is not available to respondent for the first time in this Court. This defense was suggested for the first time in the opinion of the court below. Throughout the three administrative hearings and the review thereof by the Dis-

trict Court the Service maintained that blood testing was not restricted to Chinese. The record is devoted and restricted to that factual issue and the Service did not tender or try the issue of the existence of a factual situation justifying blood testing of Chinese alone. If that claim had been made and if that issue had been tried the petitioners would have had an opportunity to meet any evidence offered in support of such a factual justification.

The unfairness of allowing the respondent to introduce this new factual issue into the case at this time is emphasized by consideration of the nature of the factual support upon which the respondent now attempts to rely on this issue and in particular the Hong Kong Report and the two law review articles co-authored by Immigration Inspector Yarbrough during the pendency of this case in which he submitted an affidavit in support of the motion for reargument (R. 91a-99a). The attempted reliance upon the Hong Kong Report, which petitioners have moved to strike as improperly submitted to the Court, violates the rule of this Court against reference to and attempted reliance upon factual matters *dehors* the record. *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 54; *Schley* v. *Pullman Car Co.*, 120 U. S. 575, 578. Similarly, the attempted reliance upon the alleged factual material, as distinguished from the legal discussion, in the two law review articles and in the judicial opinions in other cases to which the petitioners were not parties, is not permissible.

The undated anonymous Hong Kong Report is replete with unsupported dubious generalities which disclose the racial bias and antagonism of the author or authors. The respondent's reliance on such a report actually supplies further evidence of a regrettable disposition to indulge in

the racially discriminatory practice which was proved in this case.[2]

If the respondent had conceded the racial discrimination which was practiced and had sought to justify it at the administrative hearings because of alleged fraud in Chinese cases the petitioners would have had the opportunity not only to refute the hearsay generalities now offered concerning Chinese but also to show the Service's own experience with fraudulent claims of identity and citizenship in non-Chinese cases. For example in 1954 some 70 Cubans were deported for fraudulent citizenship claims supported by forged birth certificates (Annual Report of the Service for 1954, p. 45. See also 1952 Report, p. 57 for similar cases of false passports procured by Filipinos in Honolulu and p. 16 of the 1955 Report in respect of false birth certificates procured by persons from Mexico).[3]

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[2] For example, the Report appears to accuse Chinese generally of "resisting Americanization" (p. 3a); views with alarm the meager Chinese immigration into the United States (pp. 25-26); alleges hostility of the Chinese to government generally and their lack of morals in dealing with the State and their approval of bribery (p. 58); questions the loyalty of American citizens of Chinese ancestry born abroad on the basis of their lack of knowledge of the English language and of American geography (p. 81); and concludes with some vague generalities about guilt feeling of many Americans in respect of Chinese coupled with the traditional American attachment to the under-dog as assisting illegal entry into the United States (p. 88).

[3] The suggestion that American citizens of the Chinese race beget more children abroad who seek to enter the United States and therefore present a greater problem of potential fraud seems to be belied by the statistics which disclose 98 derivative citizenship certificates issued for persons from China in 1954 and 153 in 1953 compared with 1914 in 1954 and 2303 in 1955 for persons from Italy, and 1123 in 1954 and 1556 in 1955 for persons from Germany (Annual Report of the Service for 1955, p. 138). Similarly, statistics concerning the entry of non-quota immigrant alien children born abroad to United States citizens disclose, for example, for the fiscal year 1954, 2736 such children from Italy but only 336 from China (Annual Report of the Service for 1954, Table 6).

Many cases of false citizenship involving non-Chinese appear in the published reports of the Board of Immigration Appeals (VI I. & N. 259, 275; IV I. & N. 415, 748; III I. & N. 69, 76; II I. & N. 581). See also the judicial decisions involving false claims of citizenship by non-Chinese. *Cunard SS. Co.* v. *Eltinge*, 97 F. 2d 373 (C. A. 2); *Navigazione Generale Italiano* v. *Eltinge*, 76 F. 2d 885 (C. A. 2); *New York & Puerto Rico SS. Co.* v. *U. S.*, 66 F. 2d 523 (C. A. 2); *Compagnie Generale* v. *U. S.*, 78 F. Supp. 797 (Ct. Cl.); *New York & Puerto Rico SS. Co.* v. *U. S.*, 58 F. 2d 827 (S. D. N. Y.); *McFarland* v. *U. S.*, 19 F. 2d 807 (C. A. 6); *United States* v. *Mouyas*, 42 F. 2d 743 (S. D. N. Y.). Congress recently has recognized the prevalance of thousands of fraudulent claims by persons seeking to enter the United States regardless of nationality or citizenship by providing in §7 of the Act of September 11, 1957, 71 Stat. 639 (P. L. 85-316) that certain aliens who have procured visas or other documentation or entry into the United States by fraud or misrepresentation shall not be deported, and if seeking entry and excludable on such a ground may nevertheless be granted visas and admitted if the Attorney General in his discretion consents to the application for a visa. See H. R. No. 446, 85th Cong., 1st Sess.

The respondent states incorrectly (Br. 29) that Judge Dimock concluded that the program was racially discriminatory "because four Chinese from Hong Kong were blood tested" (Br. 29). Judge Dimock expressly stated that these four cases were cited merely "as examples" (R. 74a).[4] These were not "four isolated cases" as respondent erroneously argues (Br. 39) but merely a few examples which petitioners' counsel were able to obtain from members of the Bar out of many more cases known to the Service but

[4] A fifth similar example was also cited by petitioners (R. 411a-413a).

not made available to petitioners. The fact that these cases were not isolated examples seems to be conclusively established by the "evidence" which the respondent did belatedly seek to offer on the motion for reargument in the form of Exhibit B annexed to the Yarbrough affidavit of August 22, 1955 which refers to Chinese admitted without blood testing and includes no case of a Chinese admitted after June 16, 1952 (R. 98a-99a). This indicates rather clearly that all Chinese admitted thereafter, whether from Hong Kong or elsewhere, from July 1952 to December 1954, the period of the discriminatory racial practice, were blood tested because if they were not it is to be assumed that the Service would have included such cases in Exhibit B. Even the Service's claim does not indicate, as respondent implies, that forty Chinese were admitted without blood testing in cases arising "from March 1, 1952, through September 30, 1952" (Br. 39-40) but on the contrary discloses that all of these forty Chinese were admitted without blood testing prior to June 16, 1952 and apparently prior to commencement of the discriminatory practice.

Respondent's statement (Br. 40) that from August 1952 to August 1955 the Passport Office issued 5,150 passports to derivative citizens of the Chinese race without blood tests and 850 passports to such citizens with blood tests is substantially meaningless because from all that appears from the affidavit containing this information the 850 may include all Chinese applying abroad for their first passports to come to the United States and the 5,150 may be merely persons in the United States seeking a renewal of passports to visit abroad. These inapplicable and misleading statistics cannot be allowed to obscure the fact that the Service has been unable to produce one case of a Chinese derivative citizen abroad seeking to come to the United States for the first time during the period in question who was not blood tested. In the absence of such evidence, and in view of the

refusal upon the claim of privilege to produce the records which would disclose the actual facts, it is confusing if not actually misleading for the respondent to argue that the petitioners' examples of the practice of blood testing all Chinese are merely "isolated cases" or "mistaken action by local officials in a few cases" (Br. 40). These examples are evidence of a uniform racially discriminatory practice in opposition to which respondent, although repeatedly challenged to do so, has not been able to produce even one case of such a Chinese not blood tested during the period in question.

Respondent concludes his argument on this point with the extraordinary statement that if Congress did not unconstitutionally discriminate against radio workers or non-agricultural employees by legislation applicable to them and not to others on a non-racial basis, then the Service did not unlawfully discriminate against Chinese by blood testing them on a racial basis. Petitioners hesitate to argue the obvious constitutional distinction between what Congress may do by legislation on a non-racial basis and what a federal administrator may do without legislative authority on a racial basis. It is sufficient to point out that this Court has repeatedly stated that only the most compelling reasons, certainly not present here, can save from judicial condemnation any governmental discriminatory practice based on racial discrimination which violates our basic social tenets. *Bolling* v. *Sharpe*, 347 U. S. 497; *Oyama* v. *California*, 332 U. S. 640, 646; *U. S.* v. *Carolene Products*, 304 U. S. 144, 153.[5]

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[5] In *Hee Fuk Yuen* v. *White*, cited by respondent (Br. 38), the Chinese alien merchants merely sought protection of the favored nation clause of the treaty between China and the United States and not the protection of the due process clause of the Fifth Amendment. Compare *Wong Wai* v. *Williamson*, 103 Fed. 1 (C. C. N. D. Cal.) involving an unconstitutional racial application of a bubonic plague ordinance.

## III.

**The unconstitutionally acquired blood test evidence was not admissible.**

The respondent finally argues (Br. 41-43) that the disputed blood test evidence should be admitted because of the claimed reform of the procedure. This claim is based on the assertion in an affidavit on the motion for reargument of the trial court's decision of August 8, 1955, that commencing *post litem motam* in January 1955, some white persons were blood tested (R. 96a-98a). In view of the Service's insistence throughout the case that there has never been any racial discrimination and its persistent refusal to make available the facts contained in its Operations Instructions, the final disclosure that some white persons were blood tested after January 10, 1955 cannot be taken as establishing that the racial discrimination of blood testing all Chinese but not all whites was discontinued. Blood testing some whites does not excuse blood testing all Chinese. Significantly the claim that some Chinese were not blood tested before June 16, 1952 (R. 98a-99a) indicates that all Chinese were blood tested thereafter, including the period after January 1955, and there is no evidence to the contrary.

But even if we accept *arguendo* the claim that racial discrimination in blood testing has ceased, the short answer to respondent's contention that the petitioners should have no judicial protection from the racially discriminatory blood testing procedure is that the evidence should be excluded because "exclusion is the only practical way of enforcing the constitutional privilege." *U. S.* v. *Pugliese*, 153 F. 2d 497, 499 (C. A. 2, L. Hand, *J.*). Moreover, respondent is not correct in asserting that exclusion of the petitioners' blood tests would constitute a novel and ex-

tended application of the exclusionary rule beyond its "development in other fields, including criminal cases" (Br. 41). In *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 153, 155, this Court stated (Brandeis, J.): "It may be assumed that evidence obtained by the Department through an illegal search and seizure cannot be made the basis of a finding in deportation proceedings." This is but one expression of this Court's repeated recognition that evidence unconstitutionally obtained must be excluded. *Rea* v. *United States*, 350 U. S. 214; *Rochin* v. *California*, 342 U. S. 171.

Finally, respondent concludes that exclusion of the blood tests would confer on petitioners citizenship they do not possess (Br. 43). But the Board of Special Inquiry found that the testimony of petitioners and their parents was harmonious and consistent with the Service's records (R. 149a-150a) and the petitioners' exclusion as aliens was based entirely on the disputed and conflicting blood tests (R. 155a). Judge Dimock in his first opinion recognized that the accuracy of the blood tests "was clouded in doubt and uncertainty by the inconsistency between the two tests if by nothing else" (R. 47a). In his second opinion he stated that the evidence, including the blood tests, satisfied due process (R. 56a). In his third opinion he stated that petitioners' showing of paternity was sufficient but for the requirement of blood tests (R. 76a), but in view of his decision that the blood tests should be excluded he did not discuss validity or reliability of blood tests. A ground of petitioners' cross-appeal, that reliance on the conflicting blood tests denied due process of law (R. 120a), was not discussed by the court below in its opinion (R. 414a-422a) and the request for certiorari on this ground (Pet. 2, 13-15) was not granted (R. 430a). The respondent's assumption, however, that the blood tests reliably disclosed lack of paternity of any of the petitioners is not warranted

because both medical experts in this case repudiated the blood tests made in this case (Pet. 14, R. 178a, 215a-216a).

The petitioners should be ordered finally admitted as citizens on the basis of the evidence, other than the illegal blood tests, concededly sufficient to establish their paternity and of the character upon which thousands of other applicants have been admitted as citizens. The alleged reform of blood test procedure is no reason to subject these petitioners to further administrative proceedings not lawfully in use at the time they sought admission in 1952.

Respectfully submitted,

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